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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72- 72-718

JOHN DOE

v.

UNITED STATES OF AMERICA,

Respondent,

In the Matter of the Grand Jury
Testimony and Contempt of
FREDERICK KIRSHNIT

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner FREDERICK KIRSHNIT respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the District of Connecticut adjudging petitioner guilty of civil contempt for refusal to furnish handwriting exemplars to a grand jury and that he be committed to the custody of the Attorney General for a period of 90 days or until such time as he complies with the direction of the foreman of a grand jury to furnish handwriting exemplars, or until the term of the grand jury requires, whichever is earlier.

OPINION BELOW

The opinion of the court of appeals is not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals affirming that of the District Court was rendered on August 17, 1972. A copy thereof is annexed hereto as Appendix 1A.

Jurisdiction is asserted under 28 U.S.C. § 1254(1).

No extension of time within which to file the instant petition has been sought.

QUESTIONS PRESENTED

1. Whether a witness-suspect before a grand jury may be compelled to produce "non-testimonial" evidence when he is present by direction of a subpoena requiring him only to "testify"?

2. Whether a grand jury demand for handwriting exemplars is a search and seizure within the scope of the Constitution, requiring a showing by the government of probable cause to believe that the witness' handwriting is the handwriting in question.

STATEMENT OF THE CASE

The government claims that on March 27, 1972, the Constitutional National Bank in West Hartford, Connecticut, was robbed by a person who used a note written on a yellow currency count bank slip. The claimed note said, "This is a holdup I have a gun Don't touch the alarm."

The government claims that Petitioner became a suspect in that robbery. Government claims that on March 29, 1972,

Petitioner gave some four or five samples of the full text of the claimed note in his hand to agents of the government. It is also claimed that he gave government, in his hand, the entire alphabet, both capital and small letters.

On June 2, 1972, government issued a subpoena to Petitioner. (Appendix 3A.)

On June 7, 1972, Petitioner appeared before the Grand Jury of the United States District Court of Connecticut in response to that subpoena which required his presence "to testify".

In the Grand Jury room, Petitioner was advised that the reason he had been asked to appear before the Grand Jury was not to "testify" but rather to obtain samples of his writing. Petitioner was then asked to write the exact words of a claimed robbery note. Pursuant to advice of his attorney, previously given, he refused.

Petitioner was then presented before the Honorable T. Emmet Clarie, a judge of the United States District Court. Government asked that Petitioner be ordered to partially re-enact a bank robbery claimed to have taken place March 27, 1972, by writing twenty times all of the words of a robbery note on the same kind of paper used in said robbery.

After argument, the court ordered Petitioner to produce ten of the requested samples.

Petitioner respectfully declined, and, in response to the court's question, stated that he would not produce the requested writings for the Grand Jury upon his return there. The court then found him in contempt and sentenced him to ninety (90) days in the custody of the United States Attorney. Rule 42 in regard to criminal contempt has not been complied with in any way. No finding was made that

Petitioner can write or print. Petitioner was not asked if he can write or print. No evidence was offered as to how many others were arrested, questioned, or had samples taken of their handwriting.

On June 7, 1972, a notice of appeal on behalf of Petitioner was filed.

On June 19, 1972, the United States Court of Appeals for the Second Circuit upon consent of the government granted a stay of execution of sentence until an expedited appeal from the adjudication of the district court was decided. No bail or bond was required.

After oral argument of the case was heard on August 17, 1972, the Court of Appeals affirmed the holding of the United States District Court for the District of Connecticut compelling the production of handwriting exemplars. A copy of the Judgment is annexed hereto as Appendix 1A.

On application of the Petitioner (Frederick Kirshnit v. United States, Application A-244) Mr. Justice Marshall ordered that the Judgment of the United States Court of Appeals for the Second Circuit be stayed pending the timely filing of a petition for Writ of Certiorari and the court's action on the petition.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted in this case because it involves a question of interpretation of Rule 45 of The Federal Rules of Civil Procedure (28 U.S.C.A.) regarding subpoenas which has not been answered by either the United States District Court for the District of Connecticut or the United States Court of Appeals for the Second Circuit. It is Peti-

tioner's position that the subpoena issued to the Petitioner was so limited as not to require production of handwriting samples.

The power to compel a witness to attend and give testimony to a grand jury is specifically set forth by statute.

Rule 45 of the Federal Rules of Civil Procedure, Section (a) states:

"For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service."

The Federal Rules also recognize the right to command the production of "books, papers, documents, or tangible things designated therein." (Federal Rules Civil Procedure 45(b).) Petitioner, however, was served with a subpoena which commanded him only to "testify" before the Grand Jury. (Appendix 3A.)

A witness who is required to "testify" before a grand jury may invoke the Fifth Amendment privilege against self-incrimination. *Gilbert* v. *California*, 388 U.S. 263 (1967). In *Gilbert*, however, the Court also said that handwriting samples were non-testimonial in nature and outside the scope of the Protection of the Fifth Amendment. Other cases involving similar issues have reached the same conclusion. *United States* v. *Devlin*, 405 F.2d 436 (1968). *United States* v. *Schwartz*, 457 F.2d 895 (1972).

Since Petitioner was commanded by the subpoena only to "testify" he should therefore not be compelled by that same subpoena to produce that which the court has already established to be non-testimonial in nature.

This court has held that while a statute should not be interpreted so narrowly as to defeat its obvious intent, where congressional intent is discernible the court must give effect to its intent. *United States* v. *Braverman*, 373 U.S. 405 (1963); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962).

In order to give full effect to the intent of Congress, the court's first reference is to the literal meaning of the words employed. *Flora* v. *U. S.*, 357 U.S. 63 (1958). By its own language, the Congress has limited the power of the subpoena under Rule 45 (a) to compel "testimony" and by its own decisions, this court has categorized handwriting exemplars as "non-testimonial".

This Court has frequently held that a court is not justified in departing from the plain meaning of words in search of an intention which the words themselves do not suggest. *Bouie* v. *City of Columbus*, 378 U.S. 347 (1964); *Richards* v. *U. S.*, 319 U.S. 1 (1962); *Malat* v. *Riddell*, 383 U.S. 569 (1966).

To hold that a statutory subpoena specifically compelling only "testimony" may also compel the production of admittedly non-testimonial evidence constitutes such a non-justifiable departure from the plain meaning and intent of Rule 45 (a) of The Federal Rules of Civil Procedure.

II.

This Court should also grant Certiorari because this case presents substantial Fourth Amendment issues which have never been determined by the Court, and concerning

which there are conflicts in the circuits. The broad issue raised is whether a grand jury demand for handwriting exemplars is a search and seizure within the scope of the Constitution, requiring a showing by the government of probable cause to believe that the witness' handwriting is the handwriting in question.

In affirming the decision of the United States District Court for the District of Connecticut, the Court of Appeals in effect held that there was no seizure in the demand for the exemplars and that, therefore, the Fourth Amendment did not apply. Such a holding directly conflicts with decisions of the Courts of Appeal for the Fifth, Seventh, and Eighth Circuit, as well as with those of the District Courts for the Central District of California and the District of New Jersey extending the protection of the Fourth Amendment to handwriting and voice exemplars. *United States* v. *Harris and Long*, ____ F.2d ____, (8th Cir. Doc. No. 71-1220 and 1, January 12, 1972); *In re September 1971 Grand Jury, Mara* v. *United States*, 454 F.2d 580 (7th Cir. 1971), cert. filed, 40 U.S.L.W. 3316 (Sup. Ct. Doc. No. 71-850, December 30, 1971); *United States* v. *Dionisio*, 442 F.2d 276 (7th Cir. 1971), cert. filed, 40 U.S.L.W. 3170 (Sup. Ct. Doc. No. 71-229, August 14, 1971); *United States* v. *Bradford*, 429 F.2d 1275 (5th Cir. 1970) (by implication); *United States* v. *Riccardi*, Doc. No. _____ (D.N.J. February 3, 1972); *United States* v. *Praigg*, 336 F. Supp. 480 (C.D. Cal. 1972); *United States* v. *Bailey*, 327 F. Supp. 802, 804-5 (N.D. Ill. 1971).

"It is now well settled that the Fourth Amendment is applicable to the grand jury process." *In re Dionisio*, supra; *Mara* v. *United States*, supra. In *Dionisio*, the court went on to quote *Hale* v. *Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L. Ed, 652 (1906), where it was said: "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms." See also *Schwimmer* v. *U. S.*, 232

F.2d 855 (8th Cir.) Cert. denied 352 U.S. 833, 77 S. Ct. 48, 1 L. Ed. 2d 52 (1956).

In the historic case of *Boyd* v. *U. S.*, 166 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 756 (1885), this court held that a compulsory production of a party's private papers and books to be used in evidence against himself constituted an unreasonable search and seizure under the Fourth Amendment.

More recently, in *Davis* v. *Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) this court held that the Fourth Amendment does apply to the investigatory stage of a case. The court emphasized, ". . . To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. No thing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions' ". (*Id.* at 726).

In deciding whether a valid seizure has been made under the Fourth Amendment, reasonableness is the key question. *In re Dionisio*, supra. The court there said, "We believe the proposition to be clearly established that under the Fourth Amendment, law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure."

Prior cases involving the compelled production of handwriting samples have been primarily decided on Fifth Amendment argument. In the case of *United States* v. *Devlin*, supra, the Second Circuit Court of Appeals held that

the refusal of a witness appearing before a Grand Jury which was investigating stealing of postal money orders to furnish exemplars of his handwriting on printed F.B.I. forms, warranted imposition of a penalty for civil contempt. In *Devlin*, the court was faced with the claim that the defendant's Fifth Amendment rights against self-incrimination were violated. No argument was offered and hence no mention made by the court of any constitutionally protected rights under the Fourth Amendment. Thus the holding in *Devlin*, supra, must be strictly limited to situations wherein Fifth Amendment privileges against self-incrimination have been claimed.

In *Dionisio*, the court was confronted with the issue of whether or not the compelled production of voice exemplars for the Grand Jury upon its subpoena violated the defendants' rights under the Fourth Amendment. The defendants, having been called before the Grand Jury and advised that they were potential defendants in its investigations, refused the jury's request that they furnish voice exemplars which would be compared with the voices contained on F.B.I. tape recordings of telephone messages intercepted pursuant to a court-ordered wire tap. The defendants were committed for contempt for their refusal to comply with the District Court's order and appealed.

The United States Court of Appeals held that, while the procedure attempted by the Grand Jury did not violate the defendants' Fifth Amendment privileges against self-incrimination, it did violate the defendants' Fourth Amendment right against unreasonable search and seizure. The Fourth Amendment protection of voice samples extends to the handwriting. The court in *Devlin*, supra, at 438, recognized this parallel.

The Second Circuit Court of Appeals recently had an opportunity to review the *Dionisio* Fourth Amendment Argu-

ment raised in the case of *United States* v. *Cynthia B. Schwartz*, supra.

Petitioner contends that his case and *Schwartz* differ fundamentally in one regard. In *Schwartz*, the government conceded that it was required to make a showing of "reasonableness" under the Fourth Amendment. An affidavit, executed by Assistant United States Attorney, David M. Brodsky, was submitted and read in part as follows:

> "Before requesting in the Grand Jury that the witness Cynthia B. Schwartz furnish handwriting exemplars I requested a United States Postal Service Inspector who has performed investigative work in this matter to determine if satisfactory exemplars could be obtained without requiring the witness to appear before the Grand Jury.
>
> A few original documents were discovered which contained handwriting which the Postal Inspector and I believe to be that of the witness Cynthia B. Schwartz. However, the words on the documents did not include the witness' name, or any other identification. Therefore, since a conclusive link between the witness and the authorship of the handwriting could not be established so that the handwriting on the original documents could be used as exemplars, I determined that it would be necessary to subpoena the witness to the Grand Jury to furnish the exemplars."
>
> *United States* v. *Schwartz*, supra,
> Brief For Appellant, p. 5

Thus, in *Schwartz*, the government claimed that it had no means of obtaining exemplars without requiring the witness to appear before the Grand Jury.

Unlike the representation made in *Schwartz*, the government in the instant case specifically claimed that it already possessed four or five handwriting samples alleged to have been executed by the Petitioner, plus the entire alphabet, both printed and written. Moreover, the language on the samples obtained is identical to the language on the original robbery note.

Since the government, by its own claims, already possessed handwriting samples from the defendant, a request that he furnish ten or twenty more samples was "unreasonable" within the context of the Fourth Amendment. The government's affidavit made no showing of "reasonableness" or of need as was done in *Schwartz*.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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(203) 547-0100

DANIEL E. KLEINMAN
Of Counsel

CERTIFICATION

This is to certify that a copy of the above Petition for Writ of Certiorari was mailed, via United States Mail, Postage Pre-Paid, this 13th day of November, 1972, to Stuart Jones, Esq., United States Attorney for the District of Connecticut, 450 Main Street, Hartford, Connecticut 06103, and to the Hon. Erwin N. Griwold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

NORRIS L. O'NEILL, ESQ.
Attorney for Appellant

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of August one thousand nine hundred and seventy-two.

Present: HON. WALTER R. MANSFIELD,

HON. WILLIAM H. TIMBERS,
Circuit Judges

HON. MURRAY I. GURFEIN,
District Judge

(Application of United States for Order Compelling Production of Handwriting Exemplars by Frederick Kirshnit, A Witness Before Grand Jury)

United States of America,
Plaintiff-Appellee,

v.

Frederick Kirshnit,
Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said

District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

To Mr. Frederick L. Kirshnit
85 Rowe Avenue
Hartford, Connecticut

You are hereby commanded to appear in the United States District Court for the District of Connecticut at Rm. 250, Fedl. Bldg., 450 Main St. in the city of Hartford on the 7th day of June 1972 at 10:00 o'clock A.M. to testify before the Grand Jury ~~and bring with you~~[1]

This subpoena is issued on application of the United States.

GILBERT C. EARL
Clerk.

By /s/MARY T. DONOHUE
Deputy Clerk.

Date June 2, 1972.

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1. Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-718

FREDERICK KIRSHNIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On June 7, 1972, petitioner was held in civil contempt by the United States District Court for the District of Connecticut for refusing to supply handwriting exemplars to a duly constituted federal grand jury before which he had been subpoenaed. He was committed to federal custody for a period of 90 days, subject to an earlier release if he supplied the exemplars or if the grand jury was discharged. The court of appeals affirmed (Pet. App. 1a).

1. As part of its investigation into the robbery of the Constitution National Bank in West Hartford, Connecticut, the federal grand jury in the District of Connecticut sought to obtain handwriting samples

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from petitioner for comparison with the demand note used in the bank robbery. When petitioner refused to supply the exemplars, the government applied to the district court for an order compelling him to give the samples. At a hearing on the application, the stenographic minutes of the grand jury proceedings were read and the grand jury foreman stated that the grand jury requested that the handwriting exemplars be furnished (Tr. 2–7).[1] An F.B.I. agent testified at the hearing that there were several bases for considering petitioner a prime suspect in the bank robbery: photographs of the robber taken by the bank's surveillance camera, incriminating information about petitioner supplied by a confidential informant, and handwriting and handprinting samples previously furnished to the F.B.I. by petitioner voluntarily (Tr. 8–9).

The previous samples, consisting of letters of the alphabet and four or five copies of the words found in the demand note, were written on paper different from that used in the note and were found by the F.B.I. Laboratory to be inadequate for comparison purposes. Additional samples on paper identical to that used in the demand note were requested in order to make possible a conclusive comparison by the Laboratory (Tr. 9–10, 16–18). Petitioner opposed the government's application on Fourth Amendment and other grounds. The district court ordered petitioner to supply ten samples of the words in the demand

[1] "Tr." refers to the transcript of the June 7, 1972, hearing on the government's application.

note; when he refused to do so, the court held him in contempt (Tr. 11–15, 19–27).

2. Petitioner contends that the request for handwriting exemplars was outside the scope of the grand jury subpoena, which directed him "to appear * * * to testify before the Grand Jury," and was therefore invalid under Rule 45, F.R.Civ.P. (Pet. 4–6). Apart from the fact that the grand jury subpoenas are governed by Rule 17, Fed.R.Crim.P., not Rule 45 of the Civil Rules, the words "to testify" in the subpoena are not narrowly limited in meaning to the presentation of oral testimony within the Fifth Amendment's protection against compelling a person "in any criminal case to be a witness against himself * * *." Instead, these words encompass the giving of such personal evidentiary characteristics as voice samples, handwriting and fingerprints. The record shows explicitly that petitioner was aware before he entered the grand jury room that the purpose for subpoenaing him was to obtain samples of his handwriting (Tr. 4); thus petitioner's failure to comply was not based on any misunderstanding about the meaning of the subpoena.

3. Petitioner further argues that the request was a search and seizure requiring a prior showing of reasonableness and of probable cause by the Government (Pet. 6–11). This Fourth Amendment argument, like that in *Schwartz* v. *United States*, pending on petition for a writ of certiorari (No. 71–6522), raises issues presently before the Court in *United States* v. *Dionisio*, No. 71–229, and *United States* v. *Mara*, No. 71–850, which were argued on November 6, 1972. Although the show-

ing actually made by the government here would unquestionably be sufficient to satisfy the Seventh Circuit's requirements in *Dionisio* and *Mara,* it may nevertheless be appropriate to defer disposition of the instant petition until after those cases are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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